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EXAMINER

JAGAN, MIRELLYS

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 18

Application Number: 09/505,119
Filing Date: February 16, 2000
Appellant(s): REVNELL, JOSEPH D.

Marcus Dolce
For Appellant

EXAMINER'S ANSWER

MAILED

AUG 12 2003

GROUP 2800

*Vacated
See Paper #2*
This is in response to the appeal brief filed 5/8/03.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

A statement identifying the related appeals and interferences that will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

(6) Issues

The appellant's statement of the issues in the brief is substantially correct. The changes are as follows:

Issue 1 is rendered moot since the rejection of claims 17, 18, and 40-53 under 35 USC § 112, second paragraph, has been withdrawn.

In Issue 2, whether claim 64 is anticipated by Martinez is moot since the rejection of claim 64 over Martinez has been withdrawn.

In Issue 3, whether claim 49 is unpatentable over Martinez is moot since the rejection of claim 49 over Martinez has been withdrawn.

(7) Grouping of Claims

The appellant's statements of the grouping of claims in the brief is correct except for the following:

The appellant's statement in the brief that claims 45 and 60 each stands or falls alone is not agreed with because the appellant has previously stated that claim 45 stands or falls together with independent claim 17, and that claim 60 stands or falls together with independent claim 25. Therefore, the examiner assumes that claim 45 stands or falls together with independent claim 17, and that claim 60 stands or falls together with independent claim 25.

Furthermore, the appellant's grouping of claims is silent with respect to claim 57. Therefore, the examiner assumes that claim 57 stands and falls with independent claim 25 since claim 57 contains a similar limitation as claim 5, which stands and falls with independent claim 12.

(8) ClaimsAppealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

4,344,231	<i>Martinez</i>	08-1982
2614982	<i>Mercier</i>	11-1988
2,349,670	<i>Moxey</i>	5-1944
3,269,015	<i>Barker</i>	8-1966
4,835,870	<i>Rauch et al</i>	6-1989
5,768,797	<i>Trevino</i>	6-1998
6,115,931	<i>Arcand</i>	9-2000

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

A. Claims 25, 54-56, 58, 59, 61, 62, and 69 are rejected under 3.5 U.S.C. 102(b) as being anticipated by U.S. Patent 4,344,231 to Martinez.

Martinez discloses a layout device having:

a circular stationary member (12) with non-slip feet and a flat surface adapted to be marked on and a sheet of paper placed thereon, and

an angle and distance device (22, 34, 36) fixedly and rotatably attached to the stationary member, the angle and distance device including a longitudinally and laterally rigid extendable tape (34) that can be extended from a central point, an edge that

facilitates marking on the stationary member, and a carrier (36) that is pivotally coupled to the stationary member (by segment 22) and adapted to hold the tape measure.

Martinez forms a template of an area by providing the stationary member, fixedly and rotatably attaching the angle and distance device to the stationary member, recording direction information, which signify the angular location of the features of the area relative to the pivot point of the angle and distance device on the stationary member, and recording distance information, which signify the distance from the feature of the area to the pivot point of the angle and distance device on the stationary member, as the angle and distance device is rotated and the tape is extended and retracted with the tape extender to the features to thereby form an exact outline of the surface area that is being laid out. The stationary member remains stationary during at least two distance and angle information recordings (see column 3, lines 3 and 6-8, column 4, lines 22-24).

Therefore, in utilizing the device disclosed by Martinez to measure and lay out an area, the method steps of claims 25, 54-56, 58, 59, 61, 62, and 69 would inherently be followed.

B. Claims 60 and 63 are rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez.

Martinez discloses a method of measuring and laying out an area having all of the limitations of claims 60 and 63, as stated above in paragraph A, except for the step of writing directly onto the stationary member, and the stationary member being semi-circular.

Referring to claim 60, eliminating the paper disclosed by Martinez, absent any criticality, is only considered to be an obvious modification of the device disclosed by Martinez that a person having ordinary skill in the art at the time the invention was made would be able to provide using routine experimentation since the courts have held that there is no invention in eliminating an element and its function if the remaining elements perform the same functions as before. See In re Carlson, 136 USPQ 184 (CCPA 1963). In this case, when the paper on the stationary member is eliminated, all of the remaining elements will still perform the same function of providing a layout of a surface area.

Referring to claim 63, the shape of the stationary member, i.e., semi-circular shaped, absent any criticality, is only considered to be an obvious modification of the shape of the stationary member disclosed by Martinez as the courts have held that a change in shape or configuration, without any criticality, is within the level of skill in the art as the particular shape claimed by Appellant is nothing more than one of numerous shapes that a person having ordinary skill in the art will find obvious to provide using routine experimentation based on its suitability for the intended use of the invention. See In re Dailey, 149 USPQ 47 (CCPA 1976).

C. Claim 66 is rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez in view of French Patent 2614982 to Mercier.

Martinez discloses a method of measuring and laying out an area having all of the limitations of claim 66, as stated above in paragraph A, except for the angle and distance device having a digital readout for displaying the distance that the tape is extended.

Mercier discloses a tape measure having a casing with a digital readout (digital display 10) for automatically displaying the distance that the tape is extended. The digital readout allows an individual to quickly and accurately determine the distance that the tape measure is extended (see figure 1 and abstract).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the angle and distance device disclosed by Martinez by adding a digital readout that displays the distance that the tape is extended, as disclosed by Mercier, in order to allow an individual to quickly and accurately determine the distance that the tape is extended when taking measurements for a layout.

Therefore, in utilizing the device disclosed by Martinez and Mercier to measure and layout an area, the method steps of claim 66 would inherently be followed.

D. Claims 17, 40, 42-48, and 53 are rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez.

Martinez discloses a layout device having:
a circular stationary member (board 12) with non-slip feet,
a tape measure (34) connected to a carrier (36) and located within the carrier,
wherein the carrier is rotatably attached to the stationary member (by segment 22), and
a sheet of paper (44) placed on the stationary member.

Martinez teaches that the device is used for measuring and laying out a template of an area by providing the stationary member, placing a sheet of paper on the stationary member, connecting the tape measure to the carrier and rotatably attaching the carrier to

the stationary member, extending the tape measure to a critical feature of the area being measured and laid out, recording direction information of the critical feature on the paper signifying the angular location of the critical feature relative to the pivot point on the stationary member, and recording distance information of the critical feature on the paper signifying the distance from the pivot point on the stationary member to the critical feature to thereby form an exact outline of the surface area that is being laid out (see column 3, lines 3 and 6-8, column 4, lines 22-24).

Martinez does not disclose the method of measuring and laying out an area having the step of writing directly onto the stationary member, the layout device being used to measure the layout of a room, and the stationary member being semi-circular.

Referring to claim 17, Martinez teaches that his layout device can be used to layout *a* surface area, i.e., any surface area. He discloses only as an example that such an area can be a golf green, among other areas. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize the Martinez device to layout the surface area within a room since a room has a surface area and Martinez discloses that his device can be used to layout any surface area.

Referring to claim 45, eliminating the paper disclosed by Martinez, absent any criticality, is only considered to be an obvious modification of the device disclosed by Martinez that a person having ordinary skill in the art at the time the invention was made would be able to provide using routine experimentation since the courts have held that there is no invention in eliminating an element and its function if the remaining elements perform the same functions as before. See In re Karlson, 136 USPQ 184 (CCPA 1963).

In this case, when the paper on the stationary member is eliminated, all of the remaining elements will still perform the same function of providing a layout of a surface area.

Referring to claim 48, the shape of the stationary member, i.e., semi-circular shaped, absent any criticality, is only considered to be an obvious modification of the shape of the stationary member disclosed by Martinez as the courts have held that a change in shape or configuration, without any criticality, is within the level of skill in the art as the particular shape claimed by Appellant is nothing more than one of numerous shapes that a person having ordinary skill in the art will find obvious to provide using routine experimentation based on its suitability for the intended use of the invention. See *In re Dailey*, 149 USPQ 47 (CCPA 1976).

Therefore, in utilizing the device disclosed by Martinez above to measure and lay out a surface area of a room, the method steps of claims 17, 40, 42-48, and 53 would inherently be followed.

E. Claim 51 is rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez in view of Mercier.

Martinez discloses a method of measuring and laying out an area having all of the limitations of claim 51, as stated above in paragraph D, except for the device having a digital readout for displaying the distance that the tape measure is extended.

Mercier discloses a tape measure having a digital readout (digital display 10) for automatically displaying the distance that the tape measure is extended. The digital

readout allows an individual to quickly and accurately determine the distance that the tape measure is extended (see figure 1 and abstract).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Martinez by adding a digital readout displaying the distance that the tape measure is extended, as disclosed by Mercier, in order to allow an individual to quickly and accurately determine the distance that the tape measure is extended when taking measurements for a layout.

Therefore, in utilizing the device disclosed by Martinez and Mercier to measure and lay out a surface area of a room, the method steps of claim 51 would inherently be followed.

F. Claims 2-4, 7, 9, 11, 12, 14, 25, 54-56, 58, 60, 62, 63, and 65 are rejected under 35 U.S.C. 103(a) as being unpatentable over U. S. Patent 3,269,015 to Barker in view of U. S. Patent 2,349,670 to Moxey.

Barker discloses a layout device comprising:
a stationary member with a flat surface adapted to be marked on,
an angle and distance device rotatably attached to the stationary member, the angle and distance device including a carrier (10) pivotally coupled to the stationary member and adapted to hold a tape measure which incorporates a longitudinally and laterally rigid extendable tape (20) that can be extended from a central point, an edge that can facilitate marking on the stationary member to form a template as the angle and distance device is rotated and the tape is extended and retracted to critical features of an area, and

a holder (23) attached to an end of the tape and configured for holding a writing utensil (25),

wherein a template is formed by writing markings (40) directly onto the stationary member (see figure 3) as the angle and distance device is rotated and the tape is extended and retracted to critical features of an area.

Barker does not disclose the angle and distance device being fixedly and rotatably attached to the stationary member, the stationary member having a circular or semi-circular configuration, or the member being a board.

Moxey discloses a layout device having an angle and distance device that is fixedly and rotatably attached to a stationary member when the device is being used for a layout. The device utilizes means (33) to fasten the device to the stationary member. The fastening means is beneficial since it allows more accurate layouts to be formed by preventing the device from sliding or moving away from the desired pivot axis as the device is rotated about the pivot axis.

Referring to claims 9, 12, and 25, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the angle and distance device disclosed by Barker by adding means for fixedly and rotatably attaching the device to the stationary member, as disclosed by Moxey, in order to fasten the device to the stationary member and thereby obtain a more accurate layout.

Referring to claims 11, 12, 62, and 63, the shape of the stationary member, i.e., circular or semi-circular shaped, respectively, absent any criticality, is only considered to be an obvious modification of the shape of the stationary member disclosed by Barker as

the courts have held that a change in shape or configuration, without any criticality, is within the level of skill in the art as the particular shape claimed by Appellant is nothing more than one of numerous shapes that a person having ordinary skill in the art will find obvious to provide using routine experimentation based on its suitability for the intended use of the invention, i.e., to provide a layout on the surface of the member. See In re Dailey, 149 USPQ 47 (CCPA 1976).

Referring to claims 7 and 58, the particular type of material used to make the stationary member, i.e., a board, absent any criticality, is only considered to be the use of a "preferred" or "optimum" material out of a plurality of well known materials that a person of ordinary skill in the art at the time the invention was made would have been able to provide using routine experimentation based on the intended use of appellant's apparatus, i.e., suitability for the intended use of appellant's apparatus. See In re Leshin, 125 USPQ 416 (CCPA 1960) where the court stated that a selection of a material on the basis of suitability for intended use of an apparatus would be entirely obvious.

Therefore, in utilizing the device disclosed by Barker and Moxey to measure and lay out an area, the method steps of claims 25, 54-56, 58, 60, 62, 63, and 65 would inherently be followed.

G. Claims 5 and 57 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barker and Moxey, as applied to claims 2-4, 7, 9, 11, 12, 14, 25, 54-56, 58, 60, 62, 63, and 65 above, and further in view of U.S. Patent 4,835,870 to Rauch et al [hereinafter Rauch].

Barker and Moxey disclose a device having all of the limitations of claims 5 and 57, as stated above in paragraph F, except for the carrier having a front leg with straight edges and guides for the tape.

Rauch discloses a device for measuring distances having a carrier with a front leg (front end area 11c) having guides (guides 20) for a tape (tape 19). The front leg and guides are beneficial since they protect the tape from being damaged as it is retracted back into a tape measure (see figure 1, column 2, lines 10-13, and column 3, lines 33-39).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker and Moxey by adding a front leg with guides to the carrier, as disclosed by Rauch, in order to protect the tape as it is being retracted into the tape measure.

Therefore, in utilizing the device disclosed by Barker, Moxey, and Rauch to measure and lay out an area, the method steps of claim 57 would inherently be followed.

H. Claims 6, 13, and 64 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barker and Moxey, as applied to claims 2-4, 7, 9, 11, 12, 14, 25, 54-56, 58, 60, 62, 63, and 65 above, and further in view of U.S. Patent 5,768,797 to Trevino.

Barker and Moxey disclose a device having all of the limitations of claims 6, 13, and 64, as stated above in paragraph F, except for the carrier having a housing within which is located the tape measure, and the angle and distance device having a tape measure extender for mechanically extending the tape.

Trevino discloses a tape measure having a housing (12) with means for automatically extending and retracting a tape (16). The device allows a single person to extend and retract a tape while staying in a single location, thereby facilitating the taking of measurements by a single person (see figure 1 A, 2, and 3, column 1, lines 29-46, and column 3, lines 20-46).

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker and Moxey by adding tape extending means to the tape measure, as disclosed by Trevino, in order to allow a single person to extend and retract the tape while staying in a single central location when taking measurements for a layout.

Therefore, in utilizing the device disclosed by Barker, Moxey, and Trevino to measure and lay out an area, the method steps of claim 64 would inherently be followed.

I. Claims 8, 10, 59, and 61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barker and Moxey, as applied to claims 2-4, 7, 9, 11, 12, 14, 25, 54-55, 58, 60, 62, 63, and 65 above, and further in view of Martinez.

Barker and Moxey disclose a device having all of the limitations of claims 8, 10, 59, and 61, as stated above in paragraph F, except for the stationary member having non-slip feet and the stationary member having paper placed on its surface for marking thereon.

Martinez discloses a device for mapping areas having a stationary member (12) with non slip feet (18) for securing the member on a surface when extending a measuring

tape (38) that is attached to the member, and a layout formed by drawing onto paper placed on the stationary member in order to remove the layout from the stationary member after the layout is drawn. The use of a paper allows an individual to utilize the stationary member for drawing many different layouts since the markings are not placed directly on the stationary member (see figure 2).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker and Moxey by adding non-slip feet and paper to the stationary member, as disclosed by Martinez, in order to prevent the stationary member from moving when the tape is being retracted or extended from the tape measure and allow the stationary member to be utilized for more than a single layout.

Therefore, in utilizing the device disclosed by Barker, Moxey, and Martinez to measure and lay out an area, the method steps of claims 59 and 61 would inherently be followed.

J. Claims 15 and 66 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barker and Moxey, as applied to claims 2-4, 7, 9, 11, 12, 14, 25, 54-56, 58, 60, 62, 63, and 65 above, and further in view of Mercier.

Barker and Moxey disclose a device having all of the limitations of claims 15 and 66, as stated above in paragraph F, except for the device having a digital readout for displaying the distance the tape is extended.

Mercier discloses a tape measure having a digital readout (10) for automatically displaying the distance that the tape is extended. The digital readout allows an individual to quickly and accurately determine the distance that the tape measure is extended (see figure 1 and abstract).

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker and Moxey by adding a digital readout displaying the distance that the tape is extended, as disclosed by Mercier, in order to allow an individual to quickly and accurately determine the distance that the tape measure is extended when taking measurements for a layout.

Therefore, in utilizing the device disclosed by Barker, Moxey, and Mercier to layout an area, the method steps of claim 66 would inherently be followed.

K. Claim 67 is rejected under 35 U.S.C. 103(a) as being unpatentable over Barker and Moxey, as applied to claims 2-4, 7, 9, 11, 12, 14, 25, 54-56, 58, 60, 62, 63, and 65 above, and further in view of U.S. Patent 6,115,931 to Arcand.

Barker and Moxey disclose a device having all of the limitations of claim 67, as stated above in paragraph F, except for the tape having a pivotal pointer at a distal end.

Arcand discloses a tape measure having a pivotal pointer (100) at a distal end of the tape for securely attaching and aligning the distal end onto a surface thus maintaining the tape in an extended position and allowing a single person to take measurements (see figure 3 and column 3, lines 55-60)

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker and Moxey by adding a pivotal pointer at a distal end of the tape, as disclosed by Arcand, in order to allow a single person to take measurements by securely attaching and aligning the distal end onto a surface and thus maintain the tape in an extended position when marking the stationary member.

Therefore, in utilizing the device disclosed by Barker, Moxey, and Arcand to measure and lay out an area, the method steps of claim 67 would inherently be followed.

L. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Barker in view of Moxey and Arcand.

Barker discloses a layout device comprising:
a stationary member with a flat surface adapted to be marked on,
an angle and distance device rotatably attached to the stationary member and including a longitudinally and laterally rigid extensible tape that can be extended from a central point and an edge that facilitates reliably marking on the stationary member to form a template as the angle and distance device is rotated and the tape is extended and retracted to critical features of an area.

Barker does not disclose the angle and distance device being fixedly and rotatably attached to the stationary member, and the tape having a pivotal pointer at a distal end.

Moxey discloses a layout device having an angle and distance device that is fixedly and rotatably attached to a stationary member when the device is being used for a

layout. The device utilizes means (33) to fasten the device to the stationary member. The fastening means is beneficial since it allows more accurate layouts to be formed by preventing the device from sliding or moving away from the desired pivot axis as the device is rotated about the pivot axis.

Arcand discloses a tape measure having a pivotal pointer (100) at a distal end of the tape for securely attaching the distal end onto a surface thus maintaining the tape in an extended position and allowing a single person to take measurements (see figure 3 and column 3, lines 55-60).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the angle and distance device disclosed by Barker by adding means for fixedly and rotatably attaching the device to the stationary member, as disclosed by Moxey, in order to fasten the device to the stationary member and thereby obtain a more accurate layout.

Furthermore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker by adding a pivotal pointer at the distal end of the tape, as disclosed by Arcand, in order to allow a single person to take measurements by securely attaching the distal end onto a surface and thus securing the tape in an extended position when marking the stationary member.

M. Claims 30, 32, 34, and 36-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barker in view of Moxey and Trevino.

Barker discloses a layout device comprising:

a stationary member with a flat surface adapted to be marked on,
a carrier rotatably attached to the stationary member,
an extensible tape connected to the carrier and configured to be extended from the
carrier, the tape including a straight edge that can facilitate marking directly onto the
stationary member to form a template as the carrier is rotated and the tape is extended and
retracted to critical features of an area, and
a holder (23) attached to an end of the tape for holding a writing utensil (23).

Barker does not disclose the carrier being fixedly and rotatably attached to the
stationary member, the carrier having a tape extender for mechanically extending the
tape, the stationary member having a circular or semi-circular configuration, and the
stationary member being a board.

Moxey discloses a layout device having an angle and distance device that is
fixedly and rotatably attached to a stationary member when the device is being used for a
layout. The device utilizes means (33) to fasten the device to the stationary member. The
fastening means is beneficial since it allows more accurate layouts to be formed by
preventing the device from sliding or moving away from the desired pivot axis as the
device is rotated about the pivot axis.

Trevino discloses a tape measure (reel 60) integrally mounted within a housing
(housing 12) having means for automatically extending and retracting a tape (tape 16).
The device allows a single person to extend and retract a tape while staying in a single
location, thereby facilitating the taking of measurements by a single person (see figure
1A, 2, and 3, column 1, lines 29-46, and column 3, lines 20-46).

Referring to claim 30, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the angle and distance device disclosed by Barker by adding means for fixedly and rotatably attaching the device to the stationary member, as disclosed by Moxey, in order to fasten the device to the stationary member and thereby obtain a more accurate layout.

Furthermore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker by mounting the tape measure within a housing having extending means, as disclosed by Trevino, in order to allow a single person to extend and retract the tape while staying in a single central location when taking measurements for a layout.

Referring to claim 32, the particular type of material used to make the stationary member, i.e., a board, absent any criticality, is only considered to be the use of a "preferred" or "optimum" material out of a plurality of well known materials that a person of ordinary skill in the art at the time the invention was made would have been able to provide using routine experimentation based on the intended use of appellant's apparatus, i.e., suitability for the intended use of appellant's apparatus. See In re Leshin, 125 USPQ 416 (CCPA 1960), where the court stated that a selection of a material on the basis of suitability for intended use of an apparatus would be entirely obvious.

Referring to claims 36 and 37, the shape of the stationary member, i.e., circular or semicircular shaped, absent any criticality, is only considered to be an obvious modification of the shape of the stationary member disclosed by Barker, Moxey, and Trevino as the courts have held that a change in shape or configuration, without any

criticality, is within the level of skill in the art as the particular shape claimed by Appellant is nothing more than one of numerous shapes that a person having ordinary skill in the art will find obvious to provide using routine experimentation based on its suitability for the intended use of the invention, i.e., to provide a surface on which to mark a layout. See *In re Dailey*, 149 USPQ 47 (CCPA 1976).

N. Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Barker, Moxey, and Trevino, as applied to claims 30, 32, 34, and 36-38 above, and further in view of Rauch.

Barker, Moxey, and Trevino disclose a device having all of the limitations of claim 31, as stated above in paragraph M, except for the carrier having a front leg with guides for the tape.

Rauch discloses a device for measuring distances having a carrier with a front leg (front end area 11 c) having guides (guides 20) for a tape (tape 19). The front leg and guides are beneficial since they protect the tape from being damaged as it is retracted back into a tape measure (see figure 1, column 2, lines 10-13, and column 3, lines 33-39).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker, Moxey, and Trevino by adding a front leg with guides to the carrier, as disclosed by Rauch, in order to protect the tape as it is being retracted into the tape measure.

O. Claims 33 and 35 are rejected under 35 U. S. C. 103 (a) as being unpatentable over Barker, Moxey, and Trevino, as applied to claims 30, 32, 34, and 36-38 above, and further in view of Martinez.

Barker, Moxey, and Trevino disclose a device having all of the limitations of claims 33 and 35, as stated above in paragraph M, except for the stationary member having non-slip feet and the stationary member having paper placed on its surface.

Martinez discloses a device for mapping areas having a stationary member with non-slip feet for securing the member to a surface when extending a measuring tape that is attached to the member, and a template being formed by drawing onto paper placed on the stationary member in order to remove the template from the stationary member after a layout is marked. The use of paper allows an individual to utilize the stationary member for drawing many different layouts since the markings are not placed directly on the stationary member (see figure 2).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker, Moxey, and Trevino by adding non-slip feet and paper to the stationary member, as disclosed by Martinez, in order to prevent the stationary member from moving when the tape is being retracted or extended from the tape measure and allow the stationary member to be utilized for more than a single layout.

P. Claim 39 is rejected under 35 U.S.C. 103(a) as being unpatentable over Barker, Moxey, and Trevino, as applied to claims 30, 32, 34, and 36-38 above, and further in view of Arcand.

Barker, Moxey, and Trevino disclose a device having all of the limitations of claim 39, as stated above in paragraph M, except for the tape having a pivotal pointer at a distal end.

Arcand discloses a tape measure having a pivotal pointer at a distal end of the tape for securely attaching the distal end onto a surface and allowing a single person to maintain the tape in an extended position when taking measurements.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker, Moxey, and Trevino by adding a pivotal pointer at a distal end of the tape, as disclosed by Arcand, in order to allow a single person to take measurements by securely attaching the distal end onto a surface and thus maintain the tape in an extended position when marking the stationary member.

Q. Claims 17, 40, 43, 45, 47, 48, and 50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barker.

Barker discloses a layout device having:
a circular stationary member having a flat surface,

an angle and distance device rotatably attached to the stationary member, the angle and distance device having a carrier and a tape measure connected to the carrier, and

a holder (23) attached to an end of the tape and configured for holding a writing utensil (25).

Barker teaches that the device is used for creating a template by providing the stationary member, rotatably attaching the angle and distance device to the stationary member, extending the end of the tape measure of the angle and distance device to a critical feature of an area to be measured, and recording direction and distance information directly on the stationary member relating the direction and distance of the critical feature to the pivoting point of the angle and distance device.

Barker does not disclose the area being the layout of a room, the stationary member being circular or semi-circular, or the stationary member being a board.

Referring to claim 17, Barker teaches that his layout device can be used to create a layout of a surface area having critical features to which the tape is extended to, i.e., any surface area. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize the Barker device to create a layout of a room since a room has a surface area and critical features and Barker discloses that his device can be used to layout any surface area.

Referring to claim 43, the particular type of material used to make the stationary member, i.e., a board, absent any criticality, is only considered to be the use of a "preferred" or "optimum" material out of a plurality of well known materials that a

person of ordinary skill in the art at the time the invention was made would have been able to provide using routine experimentation based on the intended use of appellant's apparatus, i.e., suitability for the intended use of appellant's apparatus. See In re Leshin, 125 USPQ 416 (CCPA 1960) where the court stated that a selection of a material on the basis of suitability for intended use of an apparatus would be entirely obvious.

Referring to claims 47 and 48, the shape of the stationary member, i.e., circular or semi-circular shaped, absent any criticality, is only considered to be an obvious modification of the shape of the stationary member disclosed by Barker as the courts have held that a change in shape or configuration, without any criticality, is within the level of skill in the art as the particular shape claimed by Appellant is nothing more than one of numerous shapes that a person having ordinary skill in the art will find obvious to provide using routine experimentation based on its suitability for the intended use of the invention. See In re Dailey, 149 USPQ 47 (CCPA 1976).

Therefore, in utilizing the device disclosed by Barker to measure and lay out a surface area of a room, the method steps of claims 17, 40, 43, 45, 47, 48, and 50 would inherently be followed.

R. Claims 18 and 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barker in view of Arcand.

Barker discloses a device having all of the limitations of claims 18 and 52, as stated above in paragraph Q, except for the tape having a pivotal pointer at a distal end.

Arcand discloses a tape measure having a pivotal pointer (pin attachment 100) at a distal end of the tape for securely attaching and aligning the distal end onto a surface thus maintaining the tape in an extended position and allowing a single person to take measurements (see figure 3 and column 3, lines 55-60)

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker by adding a pivotal pointer at a distal end of the tape, as disclosed by Arcand, in order to allow a single person to take measurements by securely attaching and aligning the distal end onto a surface and thus maintain the tape in an extended position when marking the stationary member.

Therefore, in utilizing the device disclosed by Barker and Arcand to measure and lay out a surface area of a room, the method steps of claims 18 and 52 would inherently be followed.

S. Claim 41 is rejected under 35 U.S.C. 103(a) as being unpatentable over Barker in view of Rauch.

Barker discloses a device having all of the limitations of claim 41, as stated above in paragraph Q, except for the carrier having a front leg with guides for the tape.

Rauch discloses a device for measuring distances having a carrier with a front leg (front end area 11 c) having guides (guides 20) for a tape (tape 19), the guides protecting the tape from being damaged as it is retracted back into a tape measure (see figure 1, column 2, lines 10-13, and column 3, lines 33-39).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker by adding a front leg with guides to the carrier, as disclosed by Rauch, in order to protect the tape as it is being retracted into the tape measure.

Therefore, in utilizing the device disclosed by Barker and Rauch to layout a surface area of a room, the method steps of claim 41 would inherently be followed.

T. Claims 44 and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barker in view of Martinez.

Barker discloses a device having all of the limitations of claims 44 and 46, as stated above in paragraph Q, except for the stationary member having non-slip feet, the stationary member having paper placed on its surface for marking thereon.

Martinez discloses a device for mapping areas having a stationary member (12) with non-slip feet (18) for securing the member on a surface when extending a measuring tape (38) that is attached to the member, and a layout formed by drawing onto paper placed on the stationary member in order to remove the layout from the stationary member after the layout is drawn. The use of a paper allows an individual to utilize the stationary member for drawing many different layouts since the markings are not placed directly on the stationary member (see figure 2).

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker by adding non-slip feet and paper to the stationary member, as disclosed by Martinez, in order to prevent the

stationary member from moving when the tape is being retracted or extended from the tape measure and allow the stationary member to be utilized for more than a single layout.

Therefore, in utilizing the device disclosed by Barker and Martinez to layout a surface area of a room, the method steps of claims 44 and 46 would inherently be followed.

U. Claim 49 is rejected under 35 U.S.C. 103(a) as being unpatentable over Barker in view of Trevino.

Barker discloses a device having all of the limitations of claim 49, as stated above in paragraph Q, except for the device having a tape measure extender for mechanically extending the tape.

Trevino discloses a tape measure having a housing (12) with means for automatically extending and retracting a tape (16). The device allows a single person to extend and retract a tape while staying in a single location, thereby facilitating the taking of measurements by a single person (see figure 1A, 2, and 3, column 1, lines 29-46, and column 3, lines 20-46).

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker by adding tape measure-extending means, as disclosed by Trevino, in order to allow a single person to extend and retract the tape while staying in a single central location when taking measurements for a layout.

Therefore, in utilizing the device disclosed by Barker and Trevino to layout a surface area of a room, the method steps of claim 49 would inherently be followed.

V. Claim 51 is rejected under 35 U.S.C. 103(a) as being unpatentable over Barker in view of Mercier.

Barker discloses a device having all of the limitations of claim 51, as stated above in paragraph Q, except for the device having a digital readout for displaying the distance the tape is extended.

Mercier discloses a tape measure having a digital readout (10) for automatically displaying the distance that the tape is extended. The digital readout allows an individual to quickly and accurately determine the distance that the tape measure is extended (see figure 1 and abstract).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device disclosed by Barker by adding a digital readout displaying the distance the tape is extended, as disclosed by Mercier, in order to allow an individual to quickly and accurately determine the distance that the tape measure is extended when taking measurements for a layout.

(11) Response to Arguments

Issue 1: Whether claims 17, 18, and 40-53 are indefinite under 35 U.S.C. § 112, second paragraph.

Appellant's arguments with respect to the rejection of claims 17, 18, and 40-53 under 35 U.S.C. § 112, second paragraph, are moot since this rejection has been withdrawn.

Issue 2: Whether claims 25, 54-56, 58, 59, 61, 62, 64, and 69 are anticipated by Martinez.

Appellant states that Martinez fails to anticipate claim 25 because Martinez does not disclose an angle and distance device that is fixedly and rotatably attached to a stationary member. This argument is not persuasive since the peg of Martinez “rotatably” and “fixedly” attaches the angle and distance device (22, 34, 36 together comprise the angle and distance device) to the stationary member (12) by creating a single stationary pivot point having a pivot axis. The angle and distance device is fixed to the stationary member at the single stationary pivot point as the angle and distance device is rotated about the pivot axis. Therefore, the peg of Martinez does rotatably and fixedly attach the angle and distance device to the stationary member.

Appellant's arguments that Martinez fails to anticipate claim 64 are moot since the rejection of claim 64 over Martinez has been withdrawn.

Appellant states that Martinez fails to anticipate claim 69 because Martinez does not disclose recording angle information for each distance recording signifying an angle of the tape relative to the stationary member during each distance recording. This argument is not persuasive since Martinez discloses that the angle and distance device is extended to multiple locations (“x”) as it is pivoted about the stationary peg of the

stationary member. A marking that indicates the distance of one of the locations to the stationary peg on the stationary member is recorded (written) at each of the locations as the angle and distance device is rotated about the peg. Each of the markings that indicate distance also indicates angular information since they indicate the angular position of the device relative to the stationary member as the device is rotated about the peg. These markings allow an individual to create the layout of the area by indicating the distance of the location from the center pivot point as well as the angular position of the location about the pivot point. Therefore, Martinez discloses recording angle information for each of the distance recordings signifying an angle of the tape relative to the stationary member during each distance recording.

Issue 3: Whether claims 17, 40, 42-49, 53, 60, and 63 are unpatentable over Martinez.

Appellant states that claim 17 is patentable over Martinez because Martinez does not disclose or suggest utilizing the device for laying out a template of a room. This argument is not persuasive since Martinez discloses that the angle and distance device is used to create a layout (template) of an area by being extended to multiple locations of the area as it is pivoted about the stationary peg of the stationary member. Martinez discloses **as an example** only that such an area can be a golf green. A person having ordinary skill in the art would realize that the use of a golf green **as an example** of an area that can be laid out using the Martinez device does not preclude utilizing his device to layout another type of area such as a room.

Furthermore, Appellant states that claim 17 is patentable over Martinez because the legs of the Martinez stationary member are pointed. This argument is not persuasive since the fact that the legs of the stationary member of Martinez can be pointed does not preclude the device from being used to layout an area of an enclosed room.

In addition, Appellant's arguments that claim 17 is patentable over Martinez because Martinez does not disclose or suggest recording direction information on the stationary member are not persuasive for the reasons stated above in Issue 2 with respect to claim 69.

Appellant states that claim 40 is patentable over Martinez because Martinez does not disclose or suggest rotatably attaching a carrier to the stationary member and connecting the tape measure to the carrier. This argument is not persuasive since Martinez discloses that tape measure 34 is connected to a carrier 36 that is rotatably attached to the stationary member 12 by segment 22. Furthermore, appellant's arguments that the device is not "rotatably" attached to the stationary member are not persuasive for the reasons stated above in Issue 2 with respect to claim 25.

Appellant's arguments regarding claim 49 are moot since the rejection of claim 49 over Martinez has been withdrawn.

Appellant's arguments that claim 53 is patentable over Martinez because Martinez does not disclose or suggest writing angle and distance information on the stationary member are not persuasive for the reasons stated above in Issue 2 with respect to claim 69.

Issue 4: Whether claims 51 and 66 are unpatentable over Martinez in view of Mercier.

Appellant's arguments regarding the patentability of claims 51 and 66 over Martinez in view of Mercier are moot since claims 51 and 66 stand and fall with independent claims 17 and 25, respectively.

Issue 5: Whether claims 2-4, 7, 9, 11, 12, 14, 25, 54-56, 58, 60, 62, 63, and 65 are unpatentable over Barker in view of Moxey.

Appellant states that claim 9 is patentable over Barker in view of Moxey because the Moxey reference fails to disclose means for fixedly and rotatably attaching a device to a stationary member. This argument is not persuasive since Moxey discloses an angle and distance device that is fixedly and rotatably attached to a stationary member when the device is being used for a layout by a pivot pin (33) that extends into the stationary member to rotatably fix the device to the member. The pivot pin of Moxey “rotatably” and “fixedly” attaches the angle and distance device to the stationary member by creating a single stationary pivot point having a pivot axis. The angle and distance device is fixed to the single stationary member at the single stationary pivot point as the angle and distance device is rotated about the pivot axis. Therefore, the pivot pin of Moxey rotatably and fixedly attaches the angle and distance device to the stationary member.

Appellant states that claim 12 is patentable over Barker in view of Moxey because the Moxey reference fails to disclose means for fixedly and rotatably attaching a device to a stationary member. This argument is not persuasive for the reasons stated above regarding claim 9.

Appellant states that claim 25 is patentable over Barker in view of Moxey because the Moxey reference fails to disclose means for fixedly and rotatably attaching a device to a stationary member. This argument is not persuasive for the reasons stated above regarding claim 9.

Issue 6: Whether claims 5 and 57 are unpatentable over Barker in view of Moxey and Rauch et al.

Appellant's arguments regarding the patentability of claims 5 and 57 over Barker in view of Moxey and Rauch et al are moot since claims 5 and 57 stand and fall with independent claims 12 and 25, respectively.

Issue 7: Whether claims 6, 13, 30, 32, 34, 36-38, and 64 are unpatentable over Barker in view of Moxey and Trevino.

Appellant states that claim 30 is patentable over Barker in view of Moxey and Trevino because the Moxey reference fails to disclose means for fixedly and rotatably attaching a device to a stationary member. This argument is not persuasive for the reasons stated above in Issue 5 with respect to claim 9.

Issue 8: Whether claims 8, 10, 59, and 61 are unpatentable over Barker in view of Moxey and Martinez.

Appellant states that claims 8 and 59 are patentable over Barker in view of Moxey and Martinez because the Martinez reference fails to disclose non-slip feet that can be used by the Barker reference. This argument is not persuasive since Martinez discloses a device for mapping areas having a stationary member with non-slip feet (18) for preventing the stationary member from moving (sliding) when a layout is being formed and thus allowing an accurate layout to be created by maintaining the pivot point in the same stationary location throughout the taking of measurements. Barker discloses a device for laying out an area wherein an angle and distance device rotatably coupled to a stationary member and a layout is formed by writing markings (40) directly onto the stationary member (see figure 3) as the angle and distance device is rotated about a stationary pivot point on the stationary member and the tape is extended and retracted to different locations. Both Barker and Martinez disclose that the pivot point on the stationary member must remain stationary while taking measurements for the layout. Therefore, it would have been obvious to one having ordinary skill in the art to make the stationary member of Barker stationary by adding non-slip feet as taught by Martinez in order to keep the stationary member from shifting when taking measurements and since both references require that the pivot point remain at the same location while measuring the layout. Furthermore, since Barker does not state that the device must be used for a specific type of area, Barker does not preclude the use of pointed non-slip feet as taught by Martinez.

Issue 9: Whether claims 15 and 66 are unpatentable over Barker in view of Moxey and Mercier.

Appellant's arguments regarding the patentability of claims 15 and 66 over Barker in view of Moxey and Mercier are moot since claims 15 and 66 stand and fall with independent claims 12 and 25, respectively.

Issue 10: Whether claims 16 and 67 are unpatentable over Barker in view of Moxey and Arcand.

Appellant states that claims 16 and 67 are patentable over Barker in view of Moxey and Arcand because the Barker reference will be destroyed by the addition of a pointer as taught by Arcand since the device will be unable to pivot, and because Barker has a lock pin for the tape. These arguments are not persuasive since the addition of the pointer will not permanently prevent the device from pivoting about the pivot point. The addition of the pointer will temporarily secure the end of the tape in an extended position distant from the stationary member, allowing a single person utilizing the device to make other markings on the stationary member. Once released, the device can continue to pivot about the pivot point. Furthermore, the lock pin of Barker can be useful for maintaining the end of the tape in an extended position that is not distant from the lock pin, allowing a person using the device to reach the lock pin and activate it. In extending the end of the tape to a remote distance, the lock pin will not be within reach of the person using the device. Therefore, it would have been obvious to one having ordinary skill in the art to

add a pointer to the device in order to secure the end of the tape at a distance in which the lock pin is not accessible.

Furthermore, Appellant states that claim 16 is patentable over Barker in view of Moxey and Arcand because the Moxey reference fails to disclose means for fixedly and rotatably attaching a device to a stationary member. This argument is not persuasive for the reasons stated above in Issue 5 with respect to claim 9.

Issue 11: Whether claim 31 is unpatentable over Barker in view of Moxey, Trevino, and Rauch et al.

Appellant's arguments regarding the patentability of claim 31 over Barker in view of Moxey, Trevino, and Rauch et al are moot since claim 31 stands and falls with independent claim 30.

Issue 12: Whether claims 33 and 35 are unpatentable over Barker in view of Moxey, Trevino, and Martinez.

Appellant states that claim 33 is patentable over Barker in view of Moxey, Trevino, and Martinez because the Martinez reference fails to disclose non-slip feet that can be used by the Barker reference. This argument is not persuasive for the reasons stated above in Issue 8 with respect to claims 8 and 59.

Issue 13: Whether claim 39 is unpatentable over Barker in view of Moxey, Trevino, and Arcand.

Appellant states that claim 39 is patentable over Barker in view of Moxey, Trevino, and Arcand because the Barker reference will be destroyed by the addition of a pointer as taught by Arcand since the device will be unable to pivot, and because Barker has a lock pin for the tape. These arguments are not persuasive for the reasons stated above in Issue 10 with respect to claims 16 and 67.

Issue 14: Whether claims 17, 40, 43, 45, 47, 48, and 50 are unpatentable over Barker.

Appellant states that claim 17 is patentable over Barker because Barker does not disclose or suggest utilizing the device for laying out a template of a room. This argument is not persuasive since Barker discloses that the angle and distance device is used to create a layout of an area by being extended to multiple locations of the area as it is pivoted about the stationary pivot point of the stationary member.

Furthermore, Appellant states that claim 17 is patentable over Barker because Barker does not disclose or suggest recording direction and distance information on the stationary member. This argument is not persuasive since Barker discloses that the device is extended to multiple locations as it is pivoted about a pivot point on the stationary member. A marking that indicates the distance of one of the locations to the pivot point on the stationary member is recorded (written) at each of the locations as the angle and distance device is rotated about the pivot point. Each of the markings that indicate distance also indicates angular information since they indicate the angular position of the device relative to the stationary member as the device is rotated about the

pivot point. These markings allow an individual to create a layout by indicating the distance of the location from the pivot point as well as the angular position of the location about the pivot point (see figure 3 and column 2, lines 48-68). Therefore, Barker discloses recording angle information for each of the distance recordings signifying an angle of the tape relative to the stationary member during each distance recording.

Issue 15: Whether claims 18 and 52 are unpatentable over Barker in view of Arcand.

Appellant states that claims 18 and 52 are patentable over Barker in view of Arcand because the Barker reference will be destroyed by the addition of a pointer as taught by Arcand since the device will be unable to pivot, and because Barker has a lock pin for the tape. These arguments are not persuasive for the reasons stated above in Issue 10 with respect to claims 16 and 67.

Issue 16: Whether claim 41 is unpatentable over Barker in view of Rauch et al.

Appellant states that claim 14 is patentable over Barker in view of Rauch et al because neither Barker or Rauch et al disclose making a mark along the edge of the front leg. These arguments are not persuasive since in adding a leg to the device of Barker, the leg will extend under the tape to support the tape and its edge will form an extension of the edge 22, which is used for making markings. Therefore, in making markings along the edge of the slot, a marking will also be made along the edge of the front leg since the edge of the front leg is coextensive with the edge of the slot.

Issue 17: Whether claims 44 and 46 are unpatentable over Barker in view of Martinez.

Appellant states that claim 46 is patentable over Barker in view of Martinez because the Martinez reference fails to disclose non-slip feet that can be used by the Barker reference. This argument is not persuasive for the reasons stated above in Issue 8 with respect to claims 8 and 59.

Issue 18: Whether claim 49 is unpatentable over Barker in view of Trevino.

Appellant states that claim 49 is patentable over Barker in view of Trevino because claim 49 is dependent on claim 17, which the Appellant believes to be patentable. This argument is not persuasive since the Appellant does not point out the patentable novelty that he thinks claim 49 presents in view of the state of the art disclosed by Barker in view of Trevino.

Issue 19: Whether claim 51 is unpatentable over Barker in view of Mercier.

Appellant's arguments regarding the patentability of claim 51 over Barker in view of Mercier are moot since claim 51 stands and falls with independent claim 17.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



mj
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